IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLEAL NO.734 OF 2002

Maruti Bhaga Salonkhe]
At present at]
Central Prison, Thane as]
Convicted prisoner No.4206]..APPELALNT

Vs.

The State of Maharashtra]..RESPONDENT

...

Mr.Arfan A.E.Sait Advocate (appointed) for Appellant
Mr.Rajesh More A.P.P. for the State

...

CORAM: SMT.V.K.TAHILRAMANI,J.
DATE : AUGUST 25,2005

P.C.

1. The appellant has preferred this appeal through Jail. Through this appeal, the appellant-original accused no.5 has challenged the judgment and order dated 30.7.2001 passed by the learned IInd Ad-hoc Asstt.Sessions Judge, Raigad in Sessions Case No.52 of 1998. By the said judgment and order, the appellant has been convicted under Section 392 r.w. 397 of IPC and sentenced to R.I. for 7 years.

2. The prosecution story briefly stated is as under:

. The complainant P.W.7 Lancy Jamesh Nazreth has a farm house at village Vavarle, Taluka Khalapur, Dist.Raigad. He visited the same every weekend. On 30.8.1997, the complainant along with his cousin brothers Calveen Benedit (P.W.8), Deen Benedit and another friend visited the farm house. After taking dinner at about 10.00 p.m. they went to sleep. At about 00-10 hours they heard noise of loud talks. They saw their servant Suresh being brought in front of them by three persons at the point of chopper, knife and sword. Those persons said that "Do not shout, shell out Rs.2 lakhs immediately". At that time, one of the persons i.e. slim person gave a blow with sword on the right palm, right wrist and other person who had beard, gave blow on the left wrist and on the left side of the back by means of chopper and also snatched a gold chain from the neck of P.W.8 Calveen Denis Benedit. When P.W.7 Lancy intervened, the bearded person gave him fist blows

and snatched gold chain from his neck. Thereafter these persons took out an amount of Rs.2500/- from the purse of P.W.8 Lancy and the slim person took the wrist watch and two bottles of champagne kept by the side of the bed. Thereafter, those persons locked P.W.7 Lancy and P.W.8 Calveen in the room and went away. Thereafter, the complaint came to be filed.

3. After completion of investigation, the charge-sheet came to be filed against the present appellant and other accused. In due course, the case was committed to the Sessions Court. The charge came to be framed against the appellant under Sections 342, 395 and 397 of IPC. After going through the evidence adduced by the prosecution, the learned Sessions Judge acquitted the appellant under Sections 395 and 395 r.w. 397 of IPC. However, he convicted and sentence them as stated in para no.1 above. Hence, this appeal.

4. I have heard Mr.Sait, the learned advocate appointed for the appellant and Mr.Rajesh More, the learned A.P.P. for the State. I have perused the

judgment and order of the learned Sessions Judge and the record pertaining to the present case. After carefully considering the matter, I am of the opinion that this appeal deserves to be allowed.

5. There is no recovery at the instance of the present appellant either of any of the articles which were robbed or any weapons. The conviction of the appellant is based on the evidence of just two witnesses i.e. P.W.7 Lancy J.Nezreth and P.W.8 Calveen Benedit. As far as the complainant P.W.7 Lancy is concerned, at the time of identifying the accused persons in the Court, the present appellant was not present in the Court. Thus, the complainant has not identified the present appellant during the trial. In such case, the conviction of the appellant is only based on the evidence of P.W.8 Calveen who has identified him in the Court.

6. Mr.Sait, the learned advocate for the appellant has submitted that there are certain lacunae in holding test identification parade and hence, identification of the appellant cannot be relied

upon. The said lacunae are that dummies were the same in all the three rounds of the test identification parade. He further submitted that though different accused persons were put in the different parades, the dummies were the same in all the three parades. Moreover, P.W.2 Mr.Mahaddkar who held test identification parade on 2.12.1999 has admitted that the prisoners could be seen when they were taken out from the Cell. Mr.Sait has submitted that in view of this admission it is clear that the witnesses were able to see the accused persons when they were brought from the Cell to the office of Tahsildar. Thus, it is submitted that the witnesses i.e. specially P.W.8 had an opportunity of observing the appellant before the parade was held and hence, the identification by the witness therefter in the parade, cannot be relied upon. Looking to the evidence of the Tahsildar, I find much substance in this submission made by Mr.Sait.

7. Certain other lacunae were pointed out by Mr.Sait in holding test identification parade. The most glaring lacuna is that there is inordinate

delay in holding test identification parade. Mr.Sait has submitted that the incident took place on 30.8.1997 and the test identification parade in which P.W.8 Calveen has identified the appellant, was held two years and 3 months thereafter. He has further submitted that even from the date when the appellant was arrested, there is delay of six months in holding the test identification parade. The said delay has not been explained by the prosecution. Mr.Sait has submitted that identification of the appellant in a parade which was held after two years and three months, in the light of the other lacunae in the parade, cannot be relied upon. On going through the evidence on record, I find that indeed, there is enormous delay in holding the test identification parade. Besides this, the delay has not been satisfactorily explained by the prosecution. There are various other lacunae in holding the parade. Taking the cumulative effect of the delay in holding the parade and the other lacunae, I am of the view that identification of the appellant in such parade cannot be relied upon. Thus, I find much merit in the submission made by learned advocate for the

appellant.

8. In this view of the matter, I find that the identification of the appellant by P.W.8 cannot be relied upon. This is the only evidence on which the appellant has been convicted. In this view of the matter, the conviction on the basis of such evidence, cannot be sustained. Hence, the conviction and sentence of the appellant under Section 392 r.w.397 of IPC is set aside. The appellant is acquitted therefrom. The appellant be released forthwith if not required in any other case.

9. Appeal is allowed in the above terms.

[V.K.TAHILRAMANI,J.]